No. 87-564

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LIGGETT GROUP INC.,
PHILIP MORRIS INCORPORATED,
and LORILLARD, INC.,
Petitioners,

vs.

ANTONIO CIPOLLONE, Individually and as Executor of the Estate of Rose D. Cipollone,
Respondent.

LIGGETT GROUP INC., LORILLARD, INC.,
R. J. REYNOLDS TOBACCO CO.,
PHILIP MORRIS INCORPORATED,
and THE TOBACCO INSTITUTE,
Petitioners,

vs.

SUSAN HAINES, as Administratrix ad Prosequendum and Executrix of the Estate of Peter F. Rossi,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DONALD J. COHN
(Counsel of Record)
WEBSTER & SHEFFIELD
237 Park Avenue
New York, New York 10017
(212) 808-6000
Attorneys for Petitioners

(Additional Counsel Listed on Inside Cover)

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

JONES, DAY, REAVIS & POGUE
1700 Huntington Building
Cleveland, Ohio 44115
(216) 348-3939

SHOOK, HARDY & BACON
1101 Walnut
Kansas City, Missouri 64106
(816) 474-6550

QUESTIONS PRESENTED

1. Can litigants in federal courts, who have been ordered to provide discovery of their private files and materials, protect their privacy interests in such material on a showing that the opposing party threatens selectively to disseminate such private discovery material to the press and the business and investment communities, a use of such material beyond the confines of the litigation and totally unrelated to preparing the case for trial?

2. Do magistrates and trial courts have the discretion to use protective orders to accomplish the just and speedy administration of federal lawsuits and prevent parties from abusing the federal discovery process by using private discovery materials for purposes other than the prosecution of federal lawsuits?

PARTIES BELOW

This petition concerns two actions pending before The Hon. H. Lee Sarokin in the district court of New Jersey entitled *Antonio Cipollone, Individually and as Executor of the Estate of Rose D. Cipollone v. Liggett Group Inc., Philip Morris Incorporated and Loew's Theatres, Inc.*, Civil Action No. 83-2864, and *Susan Haines, as Administratrix ad Prosequendum and Executrix of the Estate of Peter F. Rossi v. Liggett Group Inc., Loew's Theatres, Inc., R.J. Reynolds Tobacco Co., Philip Morris Incorporated and The Tobacco Institute*, Civil Action No. 84-0678. The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as Executor of the Estate of Rose D. Cipollone, and Susan Haines, as Administratrix ad Prosequendum and Executrix of the Estate of Peter F. Rossi, appellees below; and Liggett Group Inc., Philip Morris, Incorporated, Loew's Theatres, Inc. (now "Lorillard, Inc."), R.J. Reynolds Tobacco Co., and The Tobacco Institute, appellants below.[1]

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[1] As required by Supreme Court Rules 21.1 and 28.1, the following is a listing of the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners: (a) For petitioner Liggett Group Inc.: L. Holdings Inc., Liggett & Myers Tobacco Co. of Canada Limited, Luxury Merchandise Co., United States Gold Co., South Dakota Gold Company Inc., and Sarah Coventry, Inc.; (b) for petitioner Philip Morris Companies Inc.: Philip Morris Inc., General Foods Corp., Miller Brewing Co., Philip Morris Credit Corp.; (c) for petitioner Lorillard, Inc.: Loews Corporation, CNA Financial Corporation, Bulova Watch Company, Inc.; (d) for petitioner R.J. Reynolds Tobacco Company: R.J.R. Nabisco Inc., Del Monte Corporation, Nabisco Brands, Inc., RJR Archer, Inc.; and (e) petitioner The Tobacco Institute is a trade association of the tobacco industry.

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Petitioners Liggett Group Inc., Philip Morris Incorporated, Lorillard, Inc., R.J. Reynolds Tobacco Co., and The Tobacco Institute respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 8, 1987.

OPINIONS BELOW

The protective orders at issue here were entered by the Magistrate in the *Cipollone* and *Haines* cases on March 25, 1985 (hereinafter the "Protective Orders") [K-1; L-1].[2] The opinion of the United States District Court for the District of New Jersey modifying the Protective Orders was issued on July 17, 1985 and is published at 106 F.R.D. 573 (D.N.J. 1985) [D-1].

The opinion of the United States Court of Appeals for the Third Circuit granting petitioners' petition for mandamus and remanding the matter to the District Court for further consideration was issued on March 12, 1986 and is published at 785 F.2d 1108 (3d Cir. 1986) [C-1]. The supplemental opinion of the United States District Court for the District of New Jersey further modifying the Protective Orders was issued on November 12, 1986 and is published at 113 F.R.D. 86 (D.N.J. 1986) [B-1].

The opinion of the Court of Appeals for the Third Circuit denying the petitioners' petition for a writ of mandamus was issued on June 8, 1987 and is published at 822 F.2d 355 (3d Cir. 1987) [A-1]. The order of the Court of Appeals for the Third Circuit denying petitioners' petition for rehearing or rehearing *en banc* was issued on July 9, 1987 [E-1].

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[2] Numbers in parenthesis refer to pages of the Appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was entered on June 8, 1987. Petitioners' petition for rehearing or rehearing *en banc* was denied in an order dated July 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Petition concerns Rules 1 and 26(c) of the Federal Rules of Civil Procedure. Rule 1 provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination f every action.

Rule 26(c) provides:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after

being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

STATEMENT OF THE CASE

The Court of Appeals for the Third Circuit below committed clear errors of law by failing to follow this Court's rulings in *Seattle Times*, 467 U.S. 20 (1984), thereby depriving petitioners of their rights to privacy. Other circuits have taken conflicting and inconsistent positions on the role of Rule 26(c) in protecting the privacy of litigants in the federal courts and promoting the efficient and fair administration of cases through discovery and trial. It is imperative that this Court give guidance to the circuits in the proper application of *Seattle Times* so that all litigants in all federal courts are treated consistently, their privacy interests protected, and cases proceed efficiently without protracted and needless discovery disputes and protective order litigation.

The Magistrate's Protective Order

From the time that these cases were filed until his appointment to the district court, then-Magistrate Cowen ruled on all discovery matters and closely monitored the progress of discovery in both of the cases.[3] He was intimately familiar with all the issues

[3] The jurisdiction of the District Court was invoked in *Cipollone* and *Haines* under U.S.C. §1332 because of diversity of citizenship. The Hon. Robert E. Cowen was the magistrate designated pursuant to 28 U.S.C. §636 to hear and determine all non-dispositive pretrial matters in both *Cipollone* and *Haines*.

surrounding discovery. In the words of the District Court, the Magistrate had been "ably supervising discovery in these complex cases" [D-4].

In May 1984 the Magistrate gave respondents extremely broad discovery [M-1]. Hundreds of thousands of documents spanning a 40-year period and describing the production, marketing, research, advertising and other activities of petitioners were produced to respondents in these cases.

In the process of obtaining broad discovery from the Magistrate, respondents' attorneys represented that they sought discovery for this case alone [N-4]. Subsequently they changed their position and stated their intention selectively to disseminate petitioner's private material which they had obtained through discovery, starting the protective order litigation which has culminated over two years later in this petition. As the first panel of the Third Circuit recognized, "it was only when plaintiffs' counsel evinced an intention to use the [discovery] material beyond the confines of the litigation that the protective order phase of the litigation began" [C-3].

The Magistrate entered identical protective orders on March 25, 1985 in both the *Cipollone* and *Haines* cases [K-1; L-1]. The Protective Orders dealt with three categories of discovery materials: materials not obtained through discovery;[4] materials designated confidential pursuant to the Federal Rules of Civil Procedure; and private materials from the files of the parties. The petitioners produced to respondents many thousands of private documents that were not designated "confidential" for special protection but which they have an interest in keeping private [N-11-12]. The dispute which is the subject of this petition concerns that private material.

Paragraph 2 of the Protective Orders provided that all information produced or exchanged would be used solely for the purpose of those cases [K-2; L-2]. Paragraph 13 provided that after

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[4] The Protective Orders specifically provided that there were no restrictions on a party's ability to disseminate information gained from other sources [K-6; L-6].

final adjudication or settlement all such information would be returned or destroyed [K-5-6; L-5-6].[5] The Protective Orders were almost identical to the protective order issued by Judge Mazzone in *Palmer v. Liggett Group Inc.*, Civ. Action No. 83-2445-MA (D. Mass. Feb 25, 1985) [Q-1] and very similar to the protective order issued by Magistrate Devine in *Barnes v. R. J. Reynolds Tobacco Co., Inc., et al.*, Civ. Action No. 84-56 AET (D.N.J. Nov 27, 1984) which in relevant part had been consented to by respondents' attorneys, who also represented the plaintiff in that case [R-1].

In issuing his Protective Orders, the Magistrate recognized the need to protect the privacy rights of petitioners. The Magistrate stated in the Protective Orders that these restrictions were appropriate because respondents' discovery demands "may require the disclosure of confidential records and private information which should otherwise remain confidential and the private property and information of the parties" and because such information "should be given the protection of an order of this Court to prevent injury to and invasion of the confidential property of the parties by reason of any disclosure not otherwise necessitated by the parties' lawful interests in this litigation" [K-1-2; L-1].[6]

At the hearing on the motions for Protective Orders, the Magistrate stated that the Protective Orders were part of an integrated discovery plan intended to "facilitate the efficacious production of documents" and to "streamline the litigation". At the same time the Magistrate also observed that anything that went into the record at the time the cases were tried would "be of a public matter and public information" [B-13].

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[5] In addition, the Protective Orders included a number of provisions governing the manner in which "confidential" documents could be used [K-2-6; L-2-6]. Under those provisions a party could initially designate any information as to which it had a "good faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto."

[6] The first panel of the Third Circuit had granted a stay when informed that respondents intended to hold a press conference to release discovery documents: a use of this material "beyond the confines of the litigation" [C-3, 14].

The District Court's First Decision

Respondents appealed the Protective Orders and the District Court vacated them and entered substitute orders of its own that removed the paragraph 2 restrictions on the dissemination of private non-confidential discovery materials [J-1]. The District Court acknowledged that the Federal Rules were "never intended as a device to procure information for a purpose unrelated to the pending litigation" and that "in the usual private litigation" there should be a presumption of privacy for materials obtained through the discovery process [D-2]. Nevertheless, the District Court then declared that because of the significance of these cases the "public has a right to know" and the "presumption should be one of freedom to publish rather than one of restraint" [D-4], even though they "may prove embarrassing and incriminating" [D-3]. As a result, the substituted orders only provided protection for "confidential" information [J-2].[7]

The Court of Appeals Grants Petitioners a Writ of Mandamus

Petitioners then petitioned the Court of Appeals for a writ of mandamus. The Court of Appeals issued a writ directing the District Court to vacate its order and reconsider the Protective Orders under appropriate standards [I-1]. In granting the writ, the Court of Appeals held that the District Court had committed clear errors of law by misreading this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). As a result, the District Court had applied the wrong standard for "good cause" under Rule 26(c).[8] The Court of Appeals summarized its holding as follows:

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[7] In addition, the District Court's substitute orders provided that petitioners would be required to demonstrate to the court on a document-by-document basis which documents should be protected and not disseminated before they could be marked "confidential" [J-2].

[8] Another error stemming from the District Court's misreading of *Seattle Times* was its exercise of plenary review over the magistrate's orders, instead of the "clearly erroneous" review specified in 28 U.S.C. §636 [C-4, 21-23].

> *Seattle Times* required the district court *merely* to inquire whether the defendants had demonstrated good cause for the protective order; the district court instead applied a least restrictive means test. *The good cause standard is significantly less demanding than the least restrictive means test*; the court's error, therefore, may have worked a serious detriment to the defendants.

[C-21] (emphasis added).

The Court of Appeals gave the District Court guidance on how it should reconsider the Protective Orders. The Court of Appeals encouraged use of protective orders in managing complex cases and cited with approval the protective order entered by Judge Mazzone in *Palmer v. Liggett Group, Inc.*, Civ. Action No. 83-2445-MA (D. Mass. Feb. 25, 1985), which had prohibited the dissemination of *all* private discovery materials, and was before the Magistrate when he issued his nearly identical Protective Orders [C-28]. The Court of Appeals also cited with approval, as had this Court in *Seattle Times*, the article by Professor Marcus that rejected the standards courts were using to issue protective orders and concluded that in complex litigation protective orders had become an accepted part of the civil litigation landscape [C-28].[9] In addition, the Court of Appeals indicated to the District Court what showing a business, whose chief concern was embarrassment, should make to secure a protective order [C-24-25].

The District Court on Remand

The District Court reconsidered the Protective Orders and arrived at almost the same erroneous result as when it used the stricter First Amendment test. It held that the Magistrate had committed clear error in issuing the Protective Orders [B-15]. In so holding, the District Court maintained its belief that discovery materials were presumptively public and seized on that portion of the Court of Appeals' mandate that required a showing of

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[9] *See* Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 11 (1983).

"significant harm" from disclosure if embarrassment was the chief concern for a protective order [B-2, 6-7].[10] The District Court did not even attempt to identify the grounds upon which the Magistrate's finding of "good cause" was based [B-7]. Instead, the District Court took upon itself to identify a number of arguments purportedly based on the record before it to support a "good cause" finding and then rejected all of them [B-7]. The District Court's modified protective orders allowed the disclosure of non-confidential private discovery material prior to trial, despite the view stated in its first opinion that such disclosure would be inappropriate for the "usual private litigation" and that such disclosure "might be embarrassing" [G-1; D-2-3].[11]

The Second Panel of the Court of Appeals

Petitioners petitioned again for mandamus, and a different panel of the Court of Appeals, by a majority, held that the District Court had complied in good faith with the Court of Appeals' mandate and had committed no clear error of law by imposing a strict "good cause" standard [A-26]. In addition, the majority of the second panel ignored petitioners' privacy rights and agreed with the District Court's conclusion that "[t]o the extent that the magistrate found good cause based on a desire to facilitate discovery or to prevent an abuse of the discovery process, the finding is contrary to law" [A-14-15]. Judge Garth in dissent argued that the District Court had not followed the Court of Appeals' mandate. He observed that the District Court's holding of "good

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[10] Here petitioners were greatly concerned about a harmful publicity campaign by respondents, obtaining a fair trial, and creating efficient and expeditious case management procedures.

[11] This time the District Court maintained the magistrate's provisions that allowed petitioners to make initial designations of confidentiality. However, the District Court struck from the Protective Orders the provision that required non-confidential materials produced in discovery to be returned or destroyed within forty-five days of a final adjudication [G-5-6]. Therefore, under the current protective orders, no matter what the verdicts in *Cipollone* and *Haines*, respondents will be able to disseminate to the public all the private non-confidential information discovered in those cases *ad infinitum*.

cause" was "reached without the review of, or the finding of, a single fact" [A-29]. Instead of identifying arguments for good cause, Judge Garth would have required the District Court to remand the issue of good cause to the Magistrate for specific findings which could then be appropriately reviewed.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS' RULINGS ARE IN CONFLICT WITH THIS COURT'S DECISION IN *SEATTLE TIMES* AND POSE A SERIOUS THREAT TO THE FUNDAMENTAL FAIRNESS OF FEDERAL LITIGATION.

This court made it clear in *Seattle Times* that Rule 26(c) protects the privacy rights of litigants in federal courts and enables trial courts to enter protective orders to achieve the efficient production of discovery materials and avoid constant disputes over the use of discovery materials for purposes unrelated to the litigation. In the opinions below, the lower courts have failed to follow these holdings and committed clear error of law. They have ignored petitioners' privacy interests and have ruled that the Magistrate acted contrary to law to the extent he based his Protective Orders on a desire to facilitate discovery or to prevent an abuse of the discovery process [A-14-15]. Other circuits have taken conflicting and inconsistent positions on these issues, which are of national importance.

The opinions below present this Court with a compelling opportunity to give guidance to the circuits so that the protection of the privacy of litigants and the use of efficient case management plans will be consistent throughout the country and the fundamental fairness, which is the hallmark of the federal judicial system, will not be compromised.

A. *This Court Has Recognized That Rule 26(c) Protects A Litigant's Right to Privacy And Ensures Efficient Case Management*

In *Seattle Times* this Court concluded that the public has no right to know of private material obtained in discovery, and that

a litigant has no right to disclose such material.[12] 467 U.S. at 32. Noting that the Federal Rules of Civil Procedure often allow "extensive intrusion into the affairs of both litigants and third parties," and that broad discovery is a "matter of legislative grace," this Court held that a litigant has no First Amendment right to disseminate "information made available only for purposes of trying his suit." 467 U.S. at 30-32. This Court stated: "Liberal discovery is provided for the *sole* purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." 467 U.S. at 34 (emphasis added).[13]

In *Seattle Times* a protective order was sustained by the highest Washington state court. The Washington Supreme Court's rationale for maintaining the privacy of the discovery material in question was set out as follows:

> Implicit in this language [Rule 26(c)] is a recognition that by requiring a party to submit to the searching inquiries of discovery, *the courts have required him to give information about himself which he would otherwise have no obligation to disclose. A realm of privacy which courts had previously left undisturbed was now*

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[12] This Court has long recognized the importance of protecting the right of privacy in a democratic society. As Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), said:

> [The makers of our Constitution] conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

This court has recognized that this right of privacy has always been present during the discovery phase of a litigation. Chief Justice Burger summarized the situation when he observed that "[i]t has never occurred to anyone, so far as I am aware, that pretrial deposition or pretrial interrogatories were other than wholly private to the litigants." *Gannett Co. v. De Pasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J. concurring).

[13] *See also Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *cert. denied, sub nom., Citytrust v. Joy*, 460 U.S. 1051 (1983) ("Protective orders are useful to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial. Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public.")

> *opened.* True, as to all information derived through these proceedings and admitted at trial, a party's interest in privacy must be sacrificed to the needs of adjudication. *But as to other information which he is forced to give under the liberal rules of discovery, the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case.* It was the needs of litigation and only those needs for which the courts adopted this rule and demanded of the litigant a duty which would not otherwise be his. *For this reason, it is proper that the courts be slow to subject a civil litigant to any exposure which he deems offensive, beyond that which serves the purpose of the rule.*

Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 236, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20 (1984) (emphasis added).

This Court upheld this reasoning by stating the following:

> Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain — incidentally or purposefully — information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. The prevention of the abuse

> that can attend the coerced production of information under a State's discovery rule *is sufficient justification for the authorization of protective orders.*

Seattle Times v. Rhinehart, 467 U.S. at 34-36 (emphasis added)(footnotes and citations omitted). In particular, this Court stated that although Rule 26(c) "contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." 467 U.S. at 35 fn. 21.

In addition, this Court held that courts may prevent the abuse of the discovery process; that is, the use of discovery material for purposes outside the litigation in question. 467 U.S. at 36. In doing so, this Court recognized that if it were to apply a heightened First Amendment scrutiny to each request for a protective order, there would be an enormous increase in discovery disputes and protective order litigation. *id.*

B. *The Lower Courts' Holdings are Directly Contrary to Seattle Times*

The Third Circuit in these cases has ruled directly in conflict with *Seattle Times*. This Court's holdings in *Seattle Times* clearly show that petitioners have a right to protection from the damaging selective disclosure of private materials obtained in discovery, most of which may ultimately prove to be irrelevant to the issues that are tried in these cases. The Third Circuit simply ignored the privacy rights of petitioners. It did not even mention, let alone discuss, the portions of the Magistrate's protective orders that recite the need to prevent injury to petitioners' privacy interests. Instead, the Third Circuit simply affirmed the District Court's use of a very strict standard for good cause similar to one that this Court specifically overruled.

The second panel's decision in effect revives the standard of *In Re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) – a decision that this Court overruled in *Seattle Times*. The majority in *Halkin* had held that in order for a court to issue a protective order a

specific showing that dissemination would cause significant injury was necessary to overcome the countervailing First Amendment interests. *Id.* at 193. Judge Wilkey in his dissent in *Halkin* argued against such a strict showing. *Id.* at 209-213. He observed that the logic of the majority's strict interpretation of Rule 26(c), which was the same logic employed by the second panel in these cases, would "virtually read out any kind of a showing under Rule 26(c) as adequate support for a [court's] protective order." *Id.* at 211. Judge Wilkey thought that "good cause" was shown if the court was provided information to balance the interests of the parties and that there was no rule of law that required a specific demonstration of harm. *Id.* at 210-211.

Judge Wilkey's "good cause" standard was subsequently adopted by this Court in *Seattle Times*. 467 U.S. at 36. In particular this Court stated that "Rule 26(c) confers broad discretion on the [court] to decide when a protective order is appropriate and what degree of protection is required" and that "[t]he unique character of the discovery process requires that the [court] have *substantial latitude* to fashion protective orders." *Id.* (emphasis added).

In these cases, such discretion was given to the Magistrate, who was the most familiar with discovery, and he determined that the Protective Orders were appropriate and necessary. The District Court on remand, affirmed by the second panel of the Third Circuit, did not "even attempt to identify" why the Magistrate found that petitioners were entitled to maintain the privacy of their internal documents [B-7; A-14]. Instead, the District Court required proof of "particularized, significant injury", a test which is as strict, if not stricter, than the "substantial and serious harm" test of *Halkin*.[14]

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[14] It made no difference to the District Court that it had originally opined "that these matters may be private and their disclosure may prove embarrassing and incriminating" [D-3] and on remand had found that defendants had shown that their financial standing had been "affected" by this and related litigation [B-8].

Nor was there any attempt by the courts below to balance petitioners' interests in protecting their privacy, avoiding embarrassment and incrimination, injury to their financial standing, and ensuring their ability to have a fair trial against any countervailing interest of respondents to disseminate petitioners' private information to the press and the investment community. There are no such countervailing interests. The Protective Orders placed no burdens on respondents and did not affect their trial preparation. The only purpose for allowing dissemination is to give respondents' attorneys the opportunity selectively to disseminate petitioners' private information to the press and the investment community for the purpose of placing petitioners in the worst possible light. *Seattle Times* clearly prevents this kind of abuse of the federal discovery process.

The Magistrate's Protective Orders have worked extremely well. Hundreds of thousands of documents have been produced. No disputes concerning the use of such materials have been presented to the Magistrate. The Magistrate's discovery orders granted respondents broad discovery; his Protective Orders granted petitioners the protection to which they were entitled.

The Third Circuit also affirmed the District Court's holding that it was "contrary to law" for the Magistrate to find good cause "based on the desire to facilitate discovery or to prevent the abuse of the discovery process" [A-14-15]. Having found an insufficient showing of particularized, significant injury, the Third Circuit below erroneously concluded that the Magistrate's only justification for the Protective Orders was case management considerations [A-15-16]. The Third Circuit in substance held that unless there is a showing of particularized, significant injury, it is contrary to law for magistrates and trial judges to issue protective orders that:

> (1) prevent abuse of the federal discovery process;
>
> (2) secure the just, speedy and inexpensive determination of civil disputes;[15] and

[15] The second panel held that there was no interplay between Rule 1 and Rule 26(c) [A-15-16]. This holding is in direct conflict with the Second Circuit's decision

(footnote continued)

> (3) avoid entangling themselves in needless discovery disputes and protective order litigation.

In conflict with this ruling by the Third Circuit, other circuits have correctly read *Seattle Times* to hold that good cause under Rule 26(c) does encompass the ability to prevent the abuse of the federal discovery process, facilitate the exchange of discovery materials and avoid needless discovery disputes and protective order litigation. The First Circuit has correctly observed that public access to private discovery materials "would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals, just as it did in this case."[16]

Furthermore, various circuits have taken inconsistent positions concerning whether materials extracted from the internal files of litigants and third parties retain their private nature once they become part of the discovery process. The Second Circuit has concluded that "the public has a presumptive right of access to discovery materials" and that such public access is particularly appropriate when the subject matter of the litigation is of a special public interest.[17] In a case involving great public interest, the Sixth Circuit referred to "the presumptively non-public fruits of civil discovery." *In Re The Courier-Journal*, *supra*. The Third Circuit in these cases did not even discuss the issue of privacy, but imposed a good cause standard so strict that it would in the words of Judge Wilkey virtually read out any showing under Rule 26(c)

in *Martindell v. I.T.&T. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979), which held that a vital function of a protective order issued under Rule 26(c) is "to secure the just, speedy and inexpensive determination of civil disputes" and that this objective "represents the cornerstone of our administration of civil justice."

[16] *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986). *See also In Re Alexander Grant & Company Litigation*, 820 F.2d 352 (11th Cir. 1987); *In Re The Courier-Journal and Louisville Times Company*, No. 86-5741, Slip op. (6th Cir. Aug. 26, 1987) (Lexis, Genfed Library, U.S. Ct. App. File).

[17] *See In Re Agent Orange Product Liability Litigation*, 821 F.2d 139, 140 (2d Cir. 1987). A petition for certiorari with respect to this decision is currently pending before this Court. (Case #87-224.)

as adequate to support a protective order. It is essential that this Court give guidance to the circuits on the proper application of *Seattle Times*, so that a litigant's right to privacy in all federal courts is re-established and lawsuits are allowed to proceed in a just, speedy and inexpensive manner.

C. *If This Court Does Not Grant This Petition, Privacy Rights of Litigants in Federal Courts Will Be Seriously Jeopardized and the Courts Themselves Will Be Greatly Burdened By Increased Discovery Disputes and Protective Order Litigation*

The strict test for good cause imposed by the District Court on remand places a party seeking a protective order to protect his privacy in a catch-22 situation. He must either wait until he has suffered injury in order to show the particularized, significant harm required (when, of course, it is too late), or he must tell the court and his opponent the material which he thinks could be used to harm him. In other words, the moving party would be required to do the work of his opponent. *Seattle Times* specifically overruled this kind of a strict test for good cause, exemplified in *In Re Halkin*. The Magistrate, who was most familiar with discovery in this case, had no difficulty in perceiving the injury the threatened publicity would cause and issued the Protective Orders. The District Court and the second panel of the Third Circuit either refused to acknowledge such injury or concluded that it could not constitute "good cause" for a protective order.

The consequence of this ruling, and that of the Second Circuit to the effect that private discovery material is presumptively public, seriously jeopardizes the right to privacy of litigants in the federal court system. It would be very difficult, if not impossible, to obtain or retain protective orders preventing dissemination of private discovery material.[18] Furthermore, a party

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[18] The First Circuit in *Anderson v. Cryovac Inc.*, *supra*, 805 F.2d at 12, and Judge Mazzone in *Palmer v. Liggett Group Inc.*, understood how such publicity could endanger a fair trial. In reaffirming his protective order against a challenge by a news organization, Judge Mazzone held: "The dissemination of this material

(footnote continued)

who wants to preserve his privacy will be forced either to resist discovery vigorously or seek a protective order to protect his privacy before he produces anything. The result, of course, will be an enormous increase in discovery disputes and protective order litigation before already overburdened magistrates and district judges. It was these case management considerations which were recognized as so important (1) by the Magistrate when he issued the Protective Orders; (2) by this Court in *Seattle Times*, and (3) by the First, Sixth and Eleventh Circuits in upholding protective orders. *See supra* at 5, 12, 15. Yet the Third Circuit ruled that the Magistrate acted contrary to law in considering case management as a basis for "good cause" in connection with his Protective Orders [A-14-15].

As shown above, it is clear that discovery is designed solely for the purpose of litigating cases in the federal courts and there is no public right of access to discovery material. The use of discovery materials for purposes unrelated to prosecuting or defending law suits constitutes an abuse of the federal process. The threat of publicity can be used to bludgeon a settlement or deter a plaintiff from bringing suit. Suits could be started to obtain information which could then be used for political or other purposes. Refusing to follow the clear guidance of this Court, the second panel of the Third Circuit agreed with the District Court on remand that it is contrary to law even to consider whether the use of discovery material unrelated to the lawsuit was an abuse of the Federal Rules and "good cause" for a protective order. While respondents are entitled under the Federal Rules of Civil Procedure to all information "reasonably calculated to lead to the discovery of admissible evidence," petitioners are equally entitled to a protective order where, in the words of this Court, "[t]here is an opportunity . . . for litigants to obtain *incidentally or purposefully* . . . information that not only is irrelevant but if publicly

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will not aid in the fair trial of this case. The trial is public and The Wall Street Journal is, of course, able to attend the trial." [P-4]

released could be damaging to reputation and privacy" 467 U.S. at 35 (emphasis added).[19] There is simply no countervailing interest to allow public access to petitioners' private discovery materials.

If a lawyer representing a private party barged into the offices of an individual or corporation and demanded to see their private files because he felt they should be disseminated to the public, it would be considered an outrage and he would be required to leave. If this lawyer went back to his office and drafted a complaint which met the requirements of notice pleading, and then took advantage of the liberal discovery rules, under the holdings of the Second and Third Circuits he could accomplish the same result.

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[19] The District Court on remand opined that "the *mere* fact that plaintiffs intend to use these materials outside of this litigation is not 'good cause' to support the protective order", unless the discovery was obtained in bad faith [B-15] (emphasis added).

CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the opinion of the Court of Appeals for the Third Circuit.

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Respectfully submitted,

DONALD J. COHN
(Counsel of Record)
WEBSTER & SHEFFIELD
237 Park Avenue
New York, NY 10017
(212) 808-6000

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

COVINGTON & BURLING
1201 Pennsylvania
Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

JONES, DAY, REAVIS
& POGUE
1700 Huntington Bldg.
Cleveland, OH 44115
(216) 348-3939

SHOOK, HARDY & BACON
1101 Walnut
Kansas City, MO 64106
(816) 474-6550